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No.

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In the Supreme Court of the United States

October Term, 1984

JOHN C. SHIMMAN,
Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

CARY RODMAN COOPER, *Counsel of Record*
THOMAS J. TUCKER
STEPHEN M. DANE
COOPER, STRAUB, WALINSKI & CRAMER
900 Adams Street
Post Office Box 1568
Toledo, Ohio 43603-1568
(419) 241-1200
Counsel for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED

This case concerns the two major equitable exceptions, and the most frequently used statutory exception, to the general "American Rule" against awarding attorney fees to a prevailing party. The questions presented are:

1. Did the Sixth Circuit *en banc* incorrectly hold, in direct conflict with decisions in at least six other circuits, that the "bad faith" exception to the American Rule is limited to bad faith in the litigation process, and does not permit attorney fees based on bad faith in the conduct giving rise to the plaintiff's underlying claims?

2. Did the Sixth Circuit *en banc* misconstrue *Hall v. Cole*, 412 U.S. 1 (1973) in holding, in conflict with six other circuits, that the "common benefit" exception to the American Rule does not apply to successful actions under the Labor-Management Reporting Disclosure Act ["LMRDA"] when the plaintiff union member obtains damages rather than injunctive relief?

3. Did the Sixth Circuit *en banc* incorrectly hold that petitioner's civil rights claims under 42 U.S.C. §§1985(3) and 1986 "were not substantial," and thereby incorrectly deny attorney fees under 42 U.S.C. §1988 for petitioner's success on his non-civil rights claims?

LIST OF PARTIES TO PROCEEDINGS BELOW

JOHN C. SHIMMAN: Plaintiff-Appellee

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18: Defendant-Appellant

John C. Shimman is the Petitioner herein; International Union of Operating Engineers, Local 18 is the Respondent.

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INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18,
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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner John C. Shimman respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 1, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (*en banc*) is reported at 744 F.2d 1226 and is reprinted at A1 of the Appendix to this Petition. The vacated panel opinion of the United States Court of

Appeals for the Sixth Circuit is reported at 719 F.2d 879 and is reprinted at A103 of the Appendix. The opinions of the United States District Court for the Northern District of Ohio dated October 20, 1981 and May 11, 1982, are unreported and are reprinted at A90 and A97 of the Appendix respectively.

The opinion of the United States Court of Appeals for the Sixth Circuit on the previous appeal is reported as *Shimman v. Frank*, 625 F.2d 80 (6th Cir. 1980), and excerpts of that opinion are reprinted at A59 of the Appendix.

JURISDICTION

The judgment sought to be reviewed by this Petition was rendered and entered on October 1, 1984. This Petition for Certiorari is filed within ninety days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

Because of their length, the following statutes are set forth verbatim in the Appendix, A115-A118:

29 U.S.C. §§411(a)(1) and 411(a)(2);
29 U.S.C. §412;
42 U.S.C. §1985(3);
42 U.S.C. §1986;
42 U.S.C. §1988.

STATEMENT OF THE CASE

A. Background.

Petitioner John C. Shimman, a member of respondent International Union of Operating Engineers, Local 18 ["Local 18"], was assaulted and beaten by union members and unknown thugs during a regular union meeting in Toledo, Ohio, on September 11, 1972. He thereafter filed suit in the United States District Court against respondent Local 18, three individuals, and the International Union of Operating Engineers ["International Union"], claiming violations of his rights under §101(a) of the Labor-Management Reporting Disclosure Act of 1959 ["LMRDA"] (also known as the Landrum-Griffin Act), 29 U.S.C. §411(a); under 42 U.S.C. §§1985(3) and 1986; and under the Ohio common law of assault and battery. Jurisdiction was based upon federal question jurisdiction, 28 U.S.C. §1331; the LMRDA, 29 U.S.C. §412; civil rights jurisdiction, 28 U.S.C. §§1343(a)(1) and 1343(a)(2); and principles of pendent jurisdiction.

On October 16, 1975 the district court found all defendants liable on petitioner's claims under the LMRDA and his pendent assault and battery claim, A29, 31-37, 38-43, but dismissed petitioner's claims under 42 U.S.C. §§1985(3) and 1986. A37-38. The district court found that respondent Local 18 and the other defendants conspired to deprive petitioner, a union dissident leader, of his free speech and political rights under 29 U.S.C. §§411(a)(1) and (a)(2), the so-called "Bill of Rights of Members of Labor Organizations", by beating him in retaliation for the exercise of those rights. A29, 31-37, 43. The district court found petitioner's beating to be the successful culmination of a plan

by incumbent union management to intimidate and silence the dissident movement within District Two of Local 18. A43, 32-33, 37.

On February 14, 1977, the district court awarded Shimman $107,067.99 in compensatory damages and a total of $675,000 in punitive damages. A45, 57, 58. Based on the "bad faith" exception to the general "American Rule" against awarding attorney fees to the prevailing party, the district court also awarded petitioner $75,000.00 in attorney fees for the trial. A56, 58. Although defendants had contested the allowance of attorney fees, they stipulated that the amount was reasonable. A57.

B. Respondent's 1980 Appeal.

All defendants, including respondent, appealed. The Court of Appeals, *Shimman v. Frank,* 625 F.2d 80 (6th Cir. 1980), upheld the district court's findings of fact and affirmed the imposition of liability against all defendants except the International Union. A59, 68-79. Petitioner's compensatory damages were upheld in full. A80-82. The punitive damages award was affirmed, although the amount was reduced. A88-89. The trial attorney fee award was affirmed "because of defendants' malicious conduct". A82.

The Court of Appeals found it unnecessary to reach petitioner's cross-appeal from the dismissal of his claims under 42 U.S.C. §§1985(3) and 1986. A63 n.10.

C. The Award Of Appellate Attorney Fees.

After the 1980 Court of Appeals decision, petitioner filed an application, supported by affidavits and time records, A98, 104, for additional attorney fees in the district court, seeking $56,178.00 as a reasonable attorney

fee for the 1980 appeal. Although respondent argued that the district court was without discretion or authority to award any fees for the appeal, respondent and the other defendants did not request a hearing, and did not contest the reasonableness of the fee amount sought by petitioner. A95, 98, 100, 104, 3. The district court awarded petitioner the additional attorney fees requested. A94-96.

Respondent and the other defendants then moved for a new trial or to amend judgment pursuant to Fed.R. Civ.P. 59(a) and (e). The district court denied the motion on May 11, 1982, A102, finding that respondent had waived any right to object to the *amount* of fees requested by petitioner or the way in which the fees were calculated. A97-102.

D. Respondent's Appeal Of The Appellate Fee Award.

Respondent Local 18 appealed.[1] On October 21, 1983, a panel of the Court of Appeals affirmed the judgment of the district court in an opinion published at 719 F.2d 879, based on the "bad faith" exception to the "American Rule". A103, 104-05. After granting respondent's petition for rehearing on December 5, 1983, A109, the Court of Appeals sitting *en banc* reversed the attorney fee award on October 1, 1984. A1, 25, 113-14. Petitioner now seeks review in this Court of the October 1, 1984 *en banc* judgment of the Court of Appeals.

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1. The appellate attorney fee award was assessed jointly and severally against respondent and the individual defendants, John Frank, James Grothaus, and Terry Grothaus, A95-96, but only respondent appealed. Nothing has ever been paid on this attorney fee judgment by any of the defendants.

REASONS FOR GRANTING THE WRIT

A. Introduction.

A decision by the Supreme Court is necessary to correct a substantial conflict among the circuits concerning the limits of the equitable exceptions to the American Rule, and to resolve important questions under 42 U.S.C. §1988. The inter-circuit conflicts and errors created by the Sixth Circuit are summarized below.

First, the *en banc* decision of the Sixth Circuit, that the bad faith exception for awarding attorney fees does not encompass malice or bad faith in the "conduct giving rise to the underlying claim", is in conflict with decisions in every other federal circuit in the country, as well as previous decisions of the Sixth Circuit. Moreover, the Sixth Circuit's decision conflicts with several other circuits' interpretations of this Court's decisions on the American Rule, including *Alyeska Pipe Line Service Co. v. Wilderness Society,* 421 U.S. 240 (1975), *Hall v. Cole,* 412 U.S. 1 (1973) and *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.,* 417 U.S. 116 (1974).

Second, the Sixth Circuit has construed this Court's decision in *Hall v. Cole, supra,* incorrectly and in an unprecedented manner that also creates a conflict among the circuits, by holding the "common benefit" exception inapplicable to this LMRDA case.

Third, in rejecting petitioner's theory under 42 U.S.C. §1988, the Sixth Circuit erroneously held petitioner's §1985(3) claim to have been "not substantial" within the meaning of *Maher v. Gagne,* 448 U.S. 122, 130-33 (1980), when the very existence of *United Brotherhood of Carpenters v. Scott,* 103 S. Ct. 3352 (1983) demonstrates that petitioner's claim was "substantial". Moreover, the lower

court construed *Smith v. Robinson*, 104 S. Ct. 3457 (1984), in a manner that would overrule *Maher v. Gagne* and ignore the legislative history of §1988.

B. The Sixth Circuit's "Bad Faith" Holding Is Unprecedented Among The Circuits And Creates A Conflict With Every Other Circuit.

The Sixth Circuit *en banc* held that the bad faith exception does not permit an award of attorney fees "based only on bad faith in the conduct giving rise to the underlying claim." A14.[2] Rather, the bad faith exception is limited to bad faith "occurring during the course of the litigation" or "in bringing an action or in causing an action to be brought." A7.

In so holding, the Sixth Circuit (1) expressly overruled its 1980 decision upholding the trial attorney fees on the alternative basis of the bad faith exception, which had been the law of the case, A14 n.11, A4 n.3; (2) expressly overruled an earlier Sixth Circuit decision to the contrary, A13 n.10; (3) expressly recognized that its holding is in-

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2. The pre-litigation bad faith in this case is conclusively established. As the district court found, "[i]t would be hard to imagine a clearer case of malice, wicked conduct, violence, and oppression than the one revealed by the evidence at the liability hearing in this case." A52. The district court found that "[t]he Court has no doubt that [Local 18] had determined that it would be necessary to use physical violence to beat the members of District 2 into submission, and that the named individual defendants were the agents selected for the purpose," A43, that defendant John Frank, the District Representative appointed by Local 18 to head District 2, "was sent to get rid of the so-called 'dissident' members of District 2", A41, and "that when all other means of silencing dissent had failed, blood was made to flow in the union hall." A37.

In upholding these factual findings, the Court of Appeals stated that "[w]e fully accept the [district] court's finding of heinous behavior." A86. The Court found "ample evidence in the record supporting a finding of liability against Local 18". A77. This evidence even included veiled discussions of murder when defendant Frank was recruiting union members for violence. A72.

consistent with decisions by the Eighth and Ninth Circuits, A13 n.10, A8 n.7; A14, and (4) cited no decision by any court anywhere in the country holding that the bad faith exception does not apply to bad faith in the acts giving rise to the substantive claim.

In fact, this *en banc* holding directly conflicts with decisions in six other circuits, in addition to previous decisions of the Sixth Circuit, all of which expressly approved an attorney fee award under the bad faith exception solely for bad faith in the defendant's actions that were the subject of the plaintiff's underlying claims. These conflicting decisions are organized by circuit in the margin,[3] and many of them came during the nine years

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3. *D.C. Circuit*: *Schlein v. Smith*, 160 F.2d 22, 25 (D.C. Cir. 1947) (fees awarded for bad faith in gross, willful fraud which was the subject of the litigation).

First Circuit: *McEnteggart v. Cataldo*, 451 F.2d 1109, 1111-12 (1st Cir. 1971), *cert. denied*, 408 U.S. 943 (1972) (awarding fees; cited with approval in *F. D. Rich Co., Inc. v. United States, etc.*, 417 U.S. 116, 129 n.17 (1974) for bad faith exception).

Third Circuit: *Skehan v. Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 57-58, 63 (3rd Cir.) (*en banc*), *cert. denied*, 429 U.S. 979 (1976).

Fourth Circuit: *Bell v. School Board of Powhatan Cty., Virginia*, 321 F.2d 494, 500, 495-98 (4th Cir. 1963) (*en banc*); *Rolax v. Atlantic Coastline R. Co.*, 186 F.2d 473, 481 (4th Cir. 1951).

Fifth Circuit: *McDonald v. Oliver*, 525 F.2d 1217, 1228, 1232-33 (5th Cir.), *cert. denied*, 429 U.S. 817 (1976); *Miller v. Carson*, 563 F.2d 741, 754 n.26 (5th Cir. 1977) (affirming district court fee award on basis of bad faith in actions/inaction underlying substantive claim, *see Miller v. Carson*, 401 F. Supp. 835, 857 (M.D. Fla. 1975)).

Sixth Circuit: Cases overruled or limited by Sixth Circuit *en banc* decision now under review: *Shimman v. Frank*, 625 F.2d 80, 100-01 (6th Cir. 1980) (A14 n.11); *Huecker v. Milburn*, 538 F.2d 1241, 1245 n.9, 1246 n.12 (6th Cir. 1976) (A13 n.10).

Eighth Circuit: *Richardson v. Communication Workers of America*, 530 F.2d 126, 132, 133 (8th Cir.), *cert. denied*, 429 U.S. 824 (1976); *Food Handlers Local 425 v. Valmac Industries*, 528 F.2d 217, 219 (8th Cir. 1975) (bad faith in fraud that was subject of underlying action, citing *Alyeska*).

after this Court's decision in *Alyeska*, widely regarded as the modern watershed in the law of attorney fees.

In addition to creating a conflict with these six other circuits, the Sixth Circuit holding is inconsistent with decisions in an additional three circuits, which approved an attorney fee award either using this pre-litigation bad faith exception as an alternative ground with some other American Rule exception,[4] or on alternative grounds of both pre-litigation bad faith and bad faith during litigation.[5] *See Sims v. Amos*, 340 F. Supp. 691, 693-94 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972).[6] Finally, the Sixth Cir-

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4. *Ninth Circuit*: *Higgins v. Hardin*, 644 F.2d 1348, 1352 (9th Cir. 1981); *Bise v. International Brotherhood of Electrical Workers*, 618 F.2d 1299, 1306, 1305-06 (9th Cir. 1979), *cert. denied*, 449 U.S. 904 (1980).

See also Pete v. United Mine Workers of America Welfare & Retirement Fund of 1950, 517 F.2d 1275, 1279, 1292-93 (D.C. Cir. 1975) (*en banc*) (bad faith was defendants' "protracted discriminatory conduct and breach of fiduciary duty", the underlying conduct that was subject of plaintiffs' substantive claim, *see Kiser v. Miller*, 364 F. Supp. 1311, 1320 (D.D.C. 1973)).

5. *Second Circuit*: *Stolberg v. Members of Board of Trustees for State Colleges of Connecticut*, 474 F.2d 485, 490-91 (2nd Cir. 1973) (bad faith included "unreasonable, obdurate obstinacy" in underlying conduct leading to the lawsuit).

Seventh Circuit: *Bond v. Stanton*, 528 F.2d 688, 689-90 (7th Cir. 1976), *vacated on other grounds*, 429 U.S. 973 (1977).

See also McQuiston v. Marsh, 707 F.2d 1082, 1086 (9th Cir. 1983) (acknowledged by Sixth Circuit *en banc* opinion to conflict with its bad faith holding, A9, 13 n.10); *Doe v. Poelker*, 515 F.2d 541, 547-48 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 519, 521 n.2 (1977) (per curiam) (obstinance and "wanton disregard" for plaintiff's rights giving rise to underlying action; awarding trial and appellate attorney fees under bad faith exception, citing *Alyeska*); *Fairley v. Patterson*, 493 F.2d 598, 605-06 (5th Cir. 1974) (defendants had been "unreasonably and obdurately obstinate" in illegal actions/inaction giving rise to underlying claim).

6. In *Sims v. Amos*, 409 U.S. 942 (1972), this Court summarily affirmed a three-judge federal court that awarded attorney fees to successful plaintiffs in an apportionment case, on alternative grounds of the bad faith exception and the "private attorney general" rationale later rejected in *Alyeska*. *Sims v. Amos*, 340 F. Supp. 691, 693-95 (M.D. Ala. 1972). In *Alyeska*,

(Continued on following page)

cuit holding is inconsistent with decisions in the two remaining circuits, that have recognized in dicta that the bad faith exception encompasses bad faith in the actions underlying the plaintiff's substantive claims.[7] Among the

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Footnote continued—
three years later, this Court held that its rejection of the "private attorney general" basis for attorney fees was consistent with its summary affirmance in *Sims v. Amos*, because the *Sims* award was based on the alternative ground of bad faith. *Alyeska Pipe Line Service Co. v. Wilderness Society*, 421 U.S. 210, 270 n.46 (1975). A summary affirmance by the Supreme Court, of course, represents a decision on the merits and constitutes precedent binding upon the lower federal courts, *see Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975), and the bad faith fee award in *Sims* was both bad faith in the underlying conduct that necessitated the litigation and the bad faith defense of the suit by the defendant. No distinction was made between these two types of bad faith. *Sims v. Amos, supra*, 340 F. Supp. at 693-94.

7. *Tenth Circuit*: *Stoddard v. School Dist. No. 1, Lincoln City, Wyoming*, 590 F.2d 829, 835 (10th Cir. 1979).

Eleventh Circuit: *See Local 317, National Post Office Mail Handlers, etc. v. National Post Office Mail Handlers, etc.*, 696 F.2d 1300, 1303 (11th Cir. 1983).

See also Piney Woods Country Life School v. Shell Oil Co., 726 F.2d 225, 241-42 (5th Cir. 1984) (denying fees because of absence of bad faith either before or during the litigation); *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1298 (9th Cir.), *cert. denied*, 459 U.S. 990 (1982) (acknowledged by Sixth Circuit *en banc* opinion to conflict with its bad faith holding, A13 n.10); *Barton v. Drummond Co.*, 636 F.2d 978, 985 (5th Cir. 1981) (bad faith exception encompasses bad faith in actions giving rise to underlying claim); *Wood v. Mills*, 528 F.2d 321, 325 (4th Cir. 1975) (denying fees because underlying gender discrimination was not done "with discriminatory intent or with malice", citing *Alyeska*); *Hallmark Clinic v. North Carolina Dep't of Human Resources*, 519 F.2d 1315, 1317 (4th Cir. 1975) (per curiam) (denying bad faith attorney fees because underlying actions were not in bad faith); *Burbank v. Twomey*, 520 F.2d 744, 749-50 (7th Cir. 1975) (denying bad faith fees, finding no bad faith in conduct which was the subject of the litigation); *Hander v. San Jacinto Junior College*, 519 F.2d 273, 280 (5th Cir. 1975) (denying fees because defendant's underlying actions were not in bad faith or "obdurate obstinacy"); *Incarcerated Men of Allen County Jail v. Fair*, 507 F.2d 281, 284, 286-87 (6th Cir. 1974) (affirming fee award on grounds other than bad faith exception because there was no finding of bad faith either before or during litigation); *Newman v. State of Alabama*, 522 F.2d 71, 72, 78, 80 (5th Cir. 1975) (*en banc*) (per curiam) (Gewin, J. dissenting on other grounds: bad faith in underlying conduct leading to the litigation is part of the bad faith exception, citing *Hall v. Cole*).

conflicting decisions are *en banc* decisions by the D.C., Third and Fourth Circuits.

This pre-litigation bad faith exception has been applied by other circuits in LMRDA actions. For example, in *McDonald v. Oliver,* 525 F.2d 1217 (5th Cir.), *cert. denied,* 429 U.S. 817 (1976), individual union members who prevailed in their action under Titles I and III of the LMRDA were awarded attorney fees, not only against their union under the "common benefit" exception, but also against the individual defendants under the bad faith exception. 525 F.2d at 1228, 1232-33. In affirming the fee award against the individuals, the Fifth Circuit cited *Alyeska* and *Hall v. Cole,* and relied strictly upon bad faith in the actions which were the subject of the plaintiffs' underlying LMRDA claims. *Id.* Similarly, the Ninth Circuit in *Higgins v. Hardin,* 644 F.2d 1348 (9th Cir. 1981) affirmed an attorney fee award against the defendant union in an LMRDA action, on alternative grounds of the common benefit and bad faith exceptions. 644 F.2d at 1352. The only bad faith the Court referred to was bad faith in the illegal actions underlying the LMRDA claims. *Id.*

The conflicting circuit decisions have not limited application of the pre-litigation bad faith exception to LMRDA cases. For example, *Skehan v. Board of Trustees of Bloomsburg State College,* 538 F.2d 53 (3d Cir.) (*en banc*), *cert. denied,* 429 U.S. 979 (1976) was a civil rights action decided prior to the enactment of the attorney fee provision in 42 U.S.C. §1988. On remand for reconsideration in light of, *inter alia,* the *Alyeska* decision, the Third Circuit, sitting *en banc,* reviewed the Supreme Court and lower court authorities and held that a pre-litigation bad faith exception to the American Rule exists and survives *Alyeska.* 538 F.2d at 57-58. In so doing, the Court specifically held that the bad faith exception is not limited to bad faith in the litigation process. *Id.* at 57. Another

application of the pre-litigation bad faith exception is *Richardson v. Communication Workers of America*, 530 F.2d 126 (8th Cir.), *cert. denied*, 429 U.S. 824 (1976) in which the Eighth Circuit approved an attorney fee award under the bad faith exception because of the defendant union's bad faith in the breach of its duty of fair representation, the same conduct that was the subject of the plaintiff's underlying claim. 530 F.2d at 132, 133.

C. The Sixth Circuit's "Bad Faith" Holding Conflicts With Prior Decisions Of The Supreme Court, As Interpreted By Several Other Circuits.

Although this Court has never definitively answered the question whether the bad faith exception applies to bad faith in the actions underlying a plaintiff's substantive claims, there are at least three ways to view this Court's major attorney fee decisions as implicitly approving this type of bad faith exception.

First, in *Hall v. Cole*, 412 U.S. 1 (1973) the Court twice indicated that the bad faith exception encompasses the type of bad faith that victimized petitioner in this case. In discussing the bad faith exception, the Court cited with approval two Fourth Circuit cases that awarded bad faith fees because of the bad faith conduct giving rise to the plaintiff's substantive claims. 412 U.S. at 5.[8] In addition,

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8. *Bell v. School Bd. of Powhatan Cty.*, 321 F.2d 494 (4th Cir. 1963) and *Rolax v. Atlantic Coastline R. Co.*, 186 F.2d 473 (4th Cir. 1951). In *Rolax*, the defendant's "discriminatory and oppressive conduct" relied upon to support the attorney fee award, 186 F.2d at 481, was unquestionably the defendant union's conduct in negotiating a discriminatory collective bargaining agreement, the same conduct challenged by the plaintiffs' underlying claim. The Sixth Circuit opinion below expressly recognized this. A8. In *Bell*, the defendants may also have been obstinate in the litigation, but the Fourth Circuit *en banc* appears to have awarded fees based upon bad faith ("the long continued pattern of evasion and obstruction" to plaintiff's constitutional rights) in the same actions that plaintiffs challenged in their substantive claims. *See* 321 F.2d at 497-98, 500, 495-96.

in the context of discussing the bad faith exception, this Court stated:

> It is clear, however, that "bad faith" may be found, *not only in the actions that led to the lawsuit,* but also in the conduct of the litigation.

412 U.S. at 15 (emphasis added). The Sixth Circuit felt itself free to ignore this clear statement in *Hall v. Cole*, claiming that it referred not to the bad faith exception but rather to the relative equities of the parties and their impact on the "common benefit" rationale. A11-12. That reading is incorrect,[9] is apparently unprecedented, and conflicts with the reading at least four other circuits have given this passage, namely that the bad faith exception encompasses bad faith "in the actions that led to the lawsuit".[10] Indeed, this Court has since quoted the above passage from *Hall v. Cole* with approval, unquestionably in the broader context of the bad faith exception rather

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9. The discussion of the relative equities of the parties' positions was concluded in the paragraph preceding the one containing the quoted statement. *See* 412 U.S. at 14-15. In context, the Supreme Court was responding to a different argument of the petitioners, namely that the absence of bad faith by defendants in illegally disciplining the union member precluded an award of attorney fees. The Court's response was twofold, first that there was bad faith in the conduct of the litigation, and the bad faith exception is not limited to "the actions that led to the lawsuit", and second that bad faith is not a requirement for application of the common benefit rationale. *See* 412 U.S. at 15.

10. The D.C. Circuit has read this passage in *Hall v. Cole* the way petitioner does, *see Lipsig v. National Student Marketing Corp.*, 663 F.2d 178, 182 n.40 (D.C. Cir. 1980) (per curiam) (dictum), as have several of the cases cited in footnotes 4, 5 and 7 of this petition: *Barton v. Drummond Co., supra*, 636 F.2d at 985 (5th Cir.) (dictum); *Bond v. Stanton, supra*, 528 F.2d at 689-90 (7th Cir.); *McQuiston v. Marsh, supra*, 707 F.2d at 1086 (9th Cir.). In addition, the Sixth Circuit in this case overruled two earlier Sixth Circuit decisions reading the *Hall v. Cole* passage the way petitioner does. *Huecker v. Milburn, supra*, 538 F.2d at 1245 n.9. *See* A13 n.10; A14 n.11.

than any discretionary weighing of equities under any American Rule exception.[11]

The second major indication from this Court of the scope of the bad faith exception is *Alyeska Pipe Line Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). In referring to the bad faith exception as one of the exceptions to the American Rule that are "unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations", 421 U.S. at 259, this Court cited its earlier decision in *F. D. Rich Co., Inc. v. United States, etc.*, 417 U.S. 116, 129 (1974). The cited page in *F. D. Rich*, in turn, cited with approval three decisions among the Circuits that awarded attorney fees for bad faith in the conduct giving rise to the litigation. *See F. D. Rich Co., Inc. v. United States, etc., supra*, 417 U.S. at 129 n.17.[12] As in *Hall v. Cole*, this implies approval of the bad faith exception including the type of bad faith involved in this case. The Third Circuit, sitting *en banc*, has read *Alyeska* and *F. D. Rich* together to reach this conclusion.[13]

Third, in *Vaughan v. Atkinson*, 369 U.S. 527 (1962), this Court approved an award of attorney fees against a defendant shipowner for its bad faith failure to obey its duty to pay maintenance and cure to a seaman. The fees were awarded because of the shipowner's "willful

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11. *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980).

12. The cases cited with approval in *F. D. Rich* were the *Bell* and *Rolax* cases, discussed in footnote 8 of this petition, and *McEnteggart v. Cataldo*, 451 F.2d 1109 (1st Cir. 1971), *cert. denied*, 408 U.S. 943 (1972).

13. *Skehan v. Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 57-58, 63 (3rd Cir.) (*en banc*), *cert. denied*, 429 U.S. 979 (1976) (on remand from Supreme Court for reconsideration in light of *Alyeska*); *see also Parker v. Shonfeld*, 409 F. Supp. 876, 883, 883 n.8 (N.D. Calif. 1976) (same reasoning).

and persistent" breach of this clear duty. 369 U.S. at 530-31.[14]

The Sixth Circuit's attempt to distinguish the pre-litigation bad faith in *Vaughan* from that in the present case, A7-8, is inconsistent with the interpretation of *Vaughan* by the Third Circuit *en banc* in *Skehan v. Board of Trustees of Bloomsburg State College, supra,* 538 F.2d at 57-58, and ignores the relevant parallel between the two cases.[15]

The Court should take this opportunity to resolve the confusion and conflict involving every circuit in the country, and clarify whether the bad faith exception includes bad faith in the defendant's actions underlying the plaintiff's substantive claims. The existence of a conflict among the circuits on this question nine years after *Alyeska* and eleven years after *Hall v. Cole* strongly suggests that the time is ripe for decision by the Supreme Court on this question.

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14. Although *Vaughan* was an admiralty case, and referred to the attorney fee award as an item of compensatory damages, later Supreme Court cases have cited *Vaughan* for the general bad faith exception to the American Rule, thus indicating that it is not limited to admiralty law or the law of compensatory damages. *See, e.g., Alyeska Pipe Line Service Co. v. Wilderness Society, supra,* 421 U.S. at 258-59; *F. D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., supra,* 417 U.S. at 129 n.17; *Hall v. Cole, supra,* 412 U.S. at 5.

15. In *Vaughan,* the seaman's right to maintenance and cure (and the shipowner's corresponding duty to provide it) arose when the seaman became ill on ship, *see* 369 U.S. at 531, but the seaman in *Vaughan* had no cause of action for maintenance and cure until the shipowner violated its duty to pay maintenance and cure. The shipowner's bad faith breach of this duty, that is, its bad faith in the very conduct that was *actionable,* was the bad faith permitting attorney fees under what later Supreme Court decisions characterized as the general bad faith exception to the American Rule. Similarly, in this case respondent's violation of petitioner's LMRDA rights was the *actionable* conduct, and respondent's bad faith in that conduct vests the district court with discretion under the bad faith exception to award attorney fees.

D. The Sixth Circuit's "Common Benefit" Holding Is Inconsistent With This Court's Decision In Hall v. Cole, And Conflicts With Decisions In At Least Six Other Circuits.

1. Hall v. Cole

The Sixth Circuit *en banc* held that as a matter of law the *Hall v. Cole* common benefit exception "does not apply to this case." A16.

In affirming the award of attorney fees to the successful LMRDA plaintiff in *Hall v. Cole,* this Court held that the federal courts have discretion to award attorney fees in cases where a single union member vindicates "his own right of free speech guaranteed by §101(a)(2) of Title I of the LMRDA". 412 U.S. at 8, 4-9. In so doing, the Supreme Court set forth the broad factors under the common benefit expception that give "the *power* of federal courts to award counsel fees generally", leaving other considerations relevant only "to the exercise of the District Court's discretion on a case-by-case basis." *See* 412 U.S. at 9, 9 n.13, 14-15 (emphasis in original).

This case plainly falls within the parameters set out in *Hall v. Cole,* so that the district court here had power and discretion to award common benefit fees. The "common benefit" in this case can be measured on two levels. First and foremost, petitioner's vindication of his LMRDA free speech and political rights is *ipso facto* a common benefit to his union. *See* 412 U.S. at 8, 9.[16] Second, peti-

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16. In this case, there can be no speculation about the "chill" and threat to the LMRDA rights of all Local 18 members. The district court found that key dissident leaders including petitioner stopped participating actively in union affairs after petitioner's public beating, and that "[t]he dissenters were finally

(Continued on following page)

tioner's prosecution of this suit was a "catalyst" resulting in the removal of the corrupt union leadership that victimized him.[17] The district court did not make any factual findings on petitioner's "catalyst" theory, finding it unnecessary to reach the common benefit argument. A95.

2. The Sixth Circuit holding conflicts with Hall v. Cole.

The Sixth Circuit held that the common benefit exception requires that the fee award "distribute fees in proportion to benefits [received]". A17, 18. The lower court concluded that petitioner's *personal* benefit, his award of compensatory and punitive damages, requires that he bear a proportionately greater portion of the attorney fees than the other union members with whom he shared a *common* benefit, *see* A17-18, so that petitioner's personal benefit removes the district court's discretion to award *any* fees under the common benefit exception.

Footnote continued—

cowed into silence. The freedom and democracy which [the LMRDA, 29 U.S.C.] §411 was enacted to protect has been effectively destroyed in District 2. . . . The defendant unions got what they wanted, the suppression of the dissidents in District 2 of Local 18." A37, 43.

As the Sixth Circuit noted in its 1980 decision, "there are few more direct ways of chilling the exercise of a union member's Landrum-Griffin Act rights than by beating him up." A69.

17. Within six weeks of the district court's February 14, 1977 final judgment, A45-58, the newly elected Business Manager of Local 18 terminated defendant John Frank's appointment as District Representative to District 2 and Frank shortly thereafter resigned his elected Local 18 office of Vice-President. (These facts are established by an affidavit in the record of William Fadel, one of the attorneys for respondent.) Removal of a union officer whose conduct is characterized by oppressive tactics abhorrent to union democracy is of substantial benefit to all union members. *See Davis v. Ampthill Rayon Workers, Inc.*, 446 F. Supp. 681, 687 (E.D. Va. 1978), *aff'd*, 594 F.2d 856 (4th Cir. 1979).

This holding (1) is unprecedented among the federal circuits; (2) misreads and conflicts with *Hall v. Cole;* (3) is based in part on a plain misreading of the *Alyeska* decision; (4) is inconsistent with common benefit decisions in several other circuits; and (5) would eliminate the *Hall v. Cole* distinction between the *existence* of discretion and the *exercise* of that discretion under the common benefit exception.

First, the Sixth Circuit misconstrues the proportionality language in *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375 (1970) and *Hall v. Cole.* The requirement that the fee award "will operate to spread the costs proportionately among" the members of the benefitted class merely means that the "costs" of obtaining the common benefit will be spread evenly across the entire benefitted class. Thus, in a shareholders' derivative action like *Mills,* "the expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation. . . ." *Mills v. Electric Auto-Lite Co., supra,* 396 U.S. at 394. In like manner, an attorney fee award against a union in LMRDA actions can be spread evenly among all union members, the benefitted class. *See Hall v. Cole, supra,* 412 U.S. at 8-9.

There will almost always be a personal, non-common benefit obtained by the individual union member in LMRDA suits. The plaintiff union member in *Hall v. Cole,* for example, obtained a personal, non-common benefit, reinstatement to the union, that was greater and in addition to the *common* benefit he shared with all his fellow union members. Yet, this Court made no mention of the plaintiff's personal, non-common benefit as a factor bear-

ing on the *existence* of discretion to award attorney fees. *See* 412 U.S. at 7-9.[18]

The discussion of the common benefit exception in *Alyeska*, cited by the Sixth Circuit, A17, does not support the type of proportionality requirement imposed by the Sixth Circuit in this case. The lower court in *Alyeska* held that an attorney fee award against the defendant Alyeska would not "spread the costs of litigation proportionately" among the class of beneficiaries simply because the beneficiary class was the public in general.[19] *See Alyeska Pipe Line Service Co. v. Wilderness Society, supra*, 421 U.S. at 265 n.39. This is what distinguishes the "private attorney general" rationale for attorney fees, rejected in *Alyeska*, from the common benefit rationale expressly approved in *Alyeska*. *See* 421 U.S. at 257-59, 265 n.39; *Skehan v. Board of Trustees of Bloomsburg State College*,

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18. In *Hall v. Cole*, the Court did not point to any tangible benefit to the union resulting from Hall's vindication of his own free speech rights. The injunctive relief of reinstatement obtained by the plaintiff in *Hall v. Cole* ran only in favor of Hall himself and not other union members. *See* 412 U.S. at 3; *Cole v. Hall*, 462 F.2d 777, 778 (2nd Cir. 1972), *aff'd*, 412 U.S. 1 (1973). Nor did this Court point to any specific, practical results of the lawsuit to the union, or refer to the particular type of relief obtained, in holding that a common benefit existed. *See id.* at 7-9. Rather, the mere vindication by Hall of his own free speech right under the LMRDA "*necessarily* rendered a substantial service to his union as an institution and to all of its members." *Id.* at 8 (emphasis added).

19. *See Wilderness Society v. Morton*, 495 F.2d 1026, 1029 (D.C. Cir. 1974) (*en banc*), *rev'd*, 421 U.S. 240 (1975). The lower court found the benefit bestowed was the vindication of "every citizen's interest in the proper functioning of our system of government." *Id.* at 1029. The defendant Alyeska was a corporation whose shareholders consisted of a consortium of oil companies. *See Alyeska Pipe Line Service Co. v. Wilderness Society, supra*, 421 U.S. 240, 241 n.2. As a result, a fee award against Alyeska would only spread the cost of the suit among several oil companies, with no indication that those costs would ultimately be passed along to the general public as opposed to "selected elements of it". *See id.* at 265 n.39.

538 F.2d 53, 56 (3rd Cir.) (*en banc*), *cert. denied*, 429 U.S. 979 (1976); *Satoskar v. Indiana Real Estate Comm'n*, 517 F.2d 696, 698 (7th Cir.), *cert. denied*, 423 U.S. 928 (1975). Contrary to the Sixth Circuit characterization, the common benefit in this case is not the benefit to "society as a whole" through "general deterrence when the law is enforced." A18 n.13. As in *Hall v. Cole*, the *common* benefit justifying attorney fees inures to the members of the plaintiff's union.

3. The Sixth Circuit holding conflicts with decisions in six other circuits.

The Sixth Circuit's proportionality reasoning is inconsistent not only with the result and reasoning of *Hall v. Cole*, but also with the reasoning and results in several decisions cited with approval by *Hall v. Cole*.[20] The Sixth Circuit *en banc* opinion acknowledged decisions by the Second, Fifth, Eighth, and Ninth Circuits approving a common benefit attorney fee award "in cases where the plaintiff received a damage award", and implied that these cases were inconsistent with its reasoning. A18 n.14. These and other decisions among the circuits conflict with the Sixth Circuit's new proportionality requirement. This is particularly true with the cases in at least two circuits ap-

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20. In *Sands v. Abelli*, 290 F. Supp. 677 (S.D. N.Y. 1968), cited in *Hall v. Cole, supra*, 412 U.S. at 9, 14, the successful LMRDA plaintiff had been awarded compensatory and punitive damages against his union local, 290 F. Supp. at 681, 683, 684, 685, and was also awarded common benefit attorney fees including fees for an appeal. *Id.* at 686.

In *Robins v. Schonfield*, 326 F. Supp. 525 (S.D. N.Y. 1971), cited with approval in *Hall v. Cole, supra*, 412 U.S. at 9, 14, the Court awarded attorney fees under the common benefit rationale to a union member who obtained compensatory damages but no injunctive relief in his successful action claiming retaliatory discipline under Title I of the LMRDA. 326 F. Supp. at 531, 526, 530, 532.

proving the common benefit attorney fees for a plaintiff who received compensatory *and* punitive damages from his union.[21] Similarly, the Sixth Circuit holding conflicts with decisions in at least four other circuits approving common benefit fee awards for plaintiffs obtaining compensatory damages in addition to personal injunctive relief,[22] or obtaining damages only and no injunctive relief of any kind.[23]

The Sixth Circuit's holding that the threshold, *i.e.*, "power", requirements under the *Hall v. Cole* common benefit exception are not met in this case creates confusion and conflicts not only with *Hall v. Cole* itself but also with decisions in at least six other circuits. The Sixth Circuit decision squarely presents an important question concerning the parameters of the common benefit exception, a question this Court should now resolve.

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21. In addition to *Sands v. Abelli, supra, see Bise v. International Brotherhood of Electrical Workers*, 618 F.2d 1299, 1302, 1306 (9th Cir. 1979), *cert. denied*, 449 U.S. 904 (1980) (LMRDA case; alternative grounds of common benefit and bad faith exceptions); *Ross v. International Brotherhood of Electrical Workers*, 544 F.2d 1022, 1025 (9th Cir. 1976) (LMRDA case; remanding for determination of damages, including possible punitive damages); *Harrison v. United Transportation Union*, 530 F.2d 558, 564, 559, 563-4 (4th Cir. 1975) (per curiam), *cert. denied*, 425 U.S. 958 (1976) (breach of duty of fair representation, remanding for allowance of trial and appellate fees, citing *Hall v. Cole*).

22. *Maceira v. Pagan*, 698 F.2d 38, 41, 39, 42 (1st Cir. 1983) (LMRDA plaintiffs' preliminary success in litigation led to settlement of reinstatement plus damages; common benefit fee approved, including fees for two successful appeals); *Feltington v. Moving Picture Machine Operators Local 306*, 605 F.2d 1251, 1257, 1258, 1258 n.12 (2nd Cir. 1979), *cert. denied*, 446 U.S. 943 (1980) (LMRDA plaintiff obtained reinstatement, remanding for trial on compensatory damages, holding district court had discretion on remand to award attorney fees).

23. *Christopher v. Safeway Stores, Inc.*, 644 F.2d 467, 469, 472 (5th Cir. 1981); *Stein v. Mutuel Clerks' Guild of Mass., Inc.*, 560 F.2d 486, 489-90, 492 (1st Cir. 1977); *Bradford v. Textile Workers of America*, 563 F.2d 1138, 1140, 1144 (4th Cir. 1977); *Emmanuel v. Omaha Carpenters Dist. Council*, 560 F.2d 382, 384, 385 (8th Cir. 1977) (duty of fair representation).

E. The Sixth Circuit Erroneously Denied Fees Under §1988 By Holding That Petitioner's Civil Rights Claims "Were Not Substantial" When The Fees Were Incurred.

Assuming that the *Maher v. Gagne,* 448 U.S. 122 (1980), "substantiality" test applies to petitioner's civil rights claims, as the Sixth Circuit *en banc* did without deciding, A20,[24] the question is whether the Sixth Circuit erroneously held that petitioner's §§1985(3) and 1986 claims, "were not substantial", A20, given the very liberal meaning of "substantial", and given the state of the law prior to 1980 when petitioner's attorney fees were incurred.

As outlined in the legislative history, the "substantiality" test requires that the civil rights claim be "substantial" within the meaning of *Hagans v. Lavine,* 415 U.S. 528, 538 (1974). *See Maher v. Gagne, supra,* 448 U.S. at 132 n.15. *Hagans* held that

> [a] claim is insubstantial only if "its unsoundness so clearly results from the previous decisions of this

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24. *Maher v. Gagne,* 448 U.S. 122 (1980) held that a plaintiff who "prevails on a wholly statutory, non-civil-rights claim pendent to a *substantial* constitutional claim" is entitled to attorney fees under 42 U.S.C. §1988 even though the district court did not reach the merits of the civil rights claim. 448 U.S. at 132, 132 n.15 (emphasis added). At least one circuit has applied the *Maher v. Gagne* "substantiality" test to the civil rights claim of a plaintiff who, like petitioner in this case, loses on the claim at trial but prevails on a non-civil rights claim, and whose cross-appeal on the civil rights claim is left unresolved. *See Williams v. Thomas,* 692 F.2d 1032, 1035, 1036, 1039 (5th Cir.), *cert. denied,* 103 S. Ct. 3115 (1983) (awarding plaintiff trial and appellate attorney fees under §1988).

The Court's language and the legislative history cited in *Maher* indicate that the same rule may apply when the civil rights claim is based upon a statutory rather than constitutional violation. *See Maher v. Gagne, supra,* 448 U.S. at 132, 132 n.15. The first important question presented under §1988 by this case is whether the "substantiality" test, rather than the more demanding test on the merits, is to be applied when the civil rights claim is "statutory" rather than "constitutional".

> court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."

415 U.S. at 538, *quoting Ex parte Poresky*, 290 U.S. 30, 32 (1933).

It can scarcely be said that in 1975, when the district court dismissed petitioner's civil rights claims, A37-38, or in 1980, when the Sixth Circuit refused to decide the issue, A63 n.10, previous decisions of the Supreme Court had "clearly" indicated that a conspiracy to violate a union member's bill of rights under §101 of the Landrum-Griffin Act is not also a conspiracy prohibited by §§1985 (3) and 1986. First, the Supreme Court held in 1980 that the phrase "and laws" as used in 42 U.S.C. §1983, a phrase also used in §1985(3), "broadly encompasses violations of federal statutory as well as constitutional law." *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

Second, the discussion in and the mere existence of the Supreme Court's 5-4 decision in *United Brotherhood of Carpenters v. Scott*, 103 S. Ct. 3352 (1983) demonstrates that as late as 1983 such a §1985(3) claim was at least "substantial".[25] Certainly, prior to this 1983 decision a very plausible argument could be made that petitioner's §1985(3) claim had merit.[26] *Cf. United Brotherhood of*

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25. *Scott* reversed a holding by the Fifth Circuit *en banc* that found that a conspiracy to beat construction workers because of their non-union status violated §1985(3). *See* 103 S. Ct. at 3356; A20-21.

26. In 1978, for example, a §1985(3) claim very similar to petitioner's claim in this case was upheld in *Murphy v. Operating Engineers, Local 18*, 99 L.R.R.M. 2074 (N.D. Ohio 1978), *appeal pending*, Case Nos. 82-3702, 82-3747 (6th Cir.). There the district court noted the requirements of *Griffin v. Breckinridge*, 403 U.S. 88 (1971), including the "class based invidiously discriminatory animus" requirement, *id.* at 2124, extensively reviewed the lower federal court decisions, and held respondent Local 18 liable under §1985(3), *id.* at 2124-2126, 2129-30, based upon a conspiracy to deprive a union member of his rights under the LMRDA. *Id.* at 2126.

Carpenters v. Scott, supra, 103 S. Ct. at 3361-69 (Blackmun, J. dissenting).

This Court should take this opportunity to clarify the scope and meaning of the *Maher v. Gagne* doctrine, which involves questions of significant national importance under 42 U.S.C. §1988, and to correct the unduly restrictive approach to §1988 taken by the Sixth Circuit.[27]

CONCLUSION

Petitioner urges the Court to grant this petition, eliminate the circuit conflicts and confusion created by the Sixth Circuit's decision on the bad faith and common benefit exceptions, and resolve the important issues presented concerning 42 U.S.C. §1988.

Respectfully submitted,

CARY RODMAN COOPER, *Counsel of Record*
THOMAS J. TUCKER
STEPHEN M. DANE
COOPER, STRAUB, WALINSKI & CRAMER
900 Adams Street
Post Office Box 1568
Toledo, Ohio 43603-1568
(419) 241-1200
Counsel for Petitioner

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27. The Sixth Circuit's interpretation of *Smith v. Robinson,* 104 S. Ct. 3457, 3468 n.12 (1984) itself raises a significant question under §1988. *Smith,* of course, is distinguishable from this and most other §1988 cases, in that the successful plaintiff there did not even plead his pertinent civil rights claims until *after* he had already prevailed on the non-fee claims. This is why the Court in *Smith* held that the plaintiff's civil rights claims "had nothing to do with [the plaintiff's] success". *See id.* at 3468 n.12. To apply that reasoning as the Sixth Circuit would, *see* A21, whenever a plaintiff obtains all his requested relief except attorney fees on non-civil rights claims, would obliterate *Maher v. Gagne* and the "substantiality" test entirely.